Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's *Ex Parte*	)	GC Docket No. 10-43
Rules and Other Procedural Rules	)	
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COMMENTS OF THE U.S. CHAMBER OF COMMERCE

Helgi C. Walker
Eve Klindera Reed
Ari Meltzer
Wiley Rein LLP
1776 K. St. NW
Washington, DC 20006
(202) 719-7000
Counsel to the U.S. Chamber of Commerce

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TABLE OF CONTENTS

Page

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	)	
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The U.S. Chamber of Commerce ("Chamber of Commerce" or "Chamber") hereby respectfully submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Further Notice of Proposed Rulemaking in the above-referenced proceeding.[1] The Chamber is the largest federation of business, trade, and professional organizations in the United States. It directly represents 300,000 members and indirectly represents the interests of more than 3 million businesses and organizations of every size, sector, and region. Approximately 96% of the Chamber's members are businesses with fewer than 100 employees. As the voice of business, the Chamber's core purpose is to advocate for free enterprise before Congress, the White House, regulatory agencies (including the FCC), the courts, and governments around the world.

The Chamber of Commerce's history dates back to 1911, when President William Howard Taft called in an address to Congress for a "central organization in touch with associations and chambers of commerce throughout the country and able to keep purely

[1] *Amendment of the Commission's* Ex Parte *Rules and Other Procedural Rules*, Further Notice of Proposed Rulemaking, GC Dkt. No. 10-43 (rel. Feb. 2, 2011) ("FNPRM").

American interests in a closer touch with different phases of commercial affairs." Shortly thereafter, the Chamber was born. Today, the Chamber is one of five most well-known and respected organizations in Washington.[2] Its diverse membership and broad interests lead it to advocate before numerous federal bodies at any one time.

In this proceeding, the Chamber respectfully urges the Commission not to adopt any final rules regarding further *ex parte* or other filing disclosures for one elementary reason: There is insufficient evidence that a substantial problem exists in this area. Organizations such as the Chamber are already well-known by participants in regulatory proceedings and the American public, so there is no public interest benefit to imposing additional disclosure requirements upon such organizations as a condition of the right to participate in agency proceedings. Indeed, enhanced disclosure requirements, such as those contemplated by the FNPRM, would only decrease the level of input that the Commission receives on its policymaking choices due to the burdens those requirements would impose on the Chamber and similar organizations. More to the point, those requirements would risk interfering with First Amendment-protected associational rights and potentially condition the right to participate in agency proceedings on the abdication of those fundamental rights.

Should the FCC nevertheless adopt further rules on this subject, it should carefully balance the burdens that such rules will impose upon entities seeking to advocate before the Commission – particularly membership organizations – against the Commission's perceived needs, and adopt the option that least burdens speech.

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[2] *See* Harris Interactive, *The Harris Poll* (Jan. 19, 2010), *available at* http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Politics-RedCross-AARP-2010-10.pdf.

I. INTRODUCTION AND SUMMARY.

In the FNPRM, the FCC proposes to craft a solution to a problem that neither it nor the advocates of the proposed rules can identify with particularity or support with any evidence. Under the guise of ensuring that parties "adequately" identify their identities or interests, the Commission proposes to adopt "enhanced disclosure" rules for some or all forms of advocacy before it. One would typically assume that "enhanced disclosure" rules are necessary to address some informational failure, but there is no such failure – or even an allegation of such failure – here. At most, some parties have suggested that a limited number of ad-hoc groups participate in certain FCC proceedings as "fronts" for other parties.

The record established in response to the Notice of Proposed Rulemaking,[3] however, is devoid of evidence that any actual problem of this nature is sufficiently widespread to warrant the adoption of generally-applicable rules. To the contrary, the record contains only anecdotal assertions of isolated incidents described by the supporters of enhanced disclosure themselves as "occasional" and "not a huge problem." In short, this is not the record upon which the Commission can or should adopt substantial burdens on the right freely to participate in FCC proceedings. Indeed, such action would run afoul of the Administrative Procedure Act ("APA"), which requires that the agency demonstrate a regulatory problem *before* it imposes a remedy.

Moreover, in considering whether to adopt additional disclosure requirements, the Commission must, at the very least, remain sensitive to the First Amendment interests at stake. Conditioning the right to advocate freely before the FCC on compliance with enhanced disclosure rules would not only generally interfere with the political speech rights of all affected parties, but would also tread, in particular, on the associational rights of membership

[3] *In the Matter of Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, Notice of Proposed Rulemaking, GC Dkt. No. 10-43 (rel. Feb. 22, 2010) ("NPRM").

organizations. The Commission must also be mindful of the unique burdens that enhanced disclosure mandates would impose on membership organizations such as the Chamber, which has a membership roster that changes frequently and, due to its far-reaching purpose, participates in proceedings before numerous agencies and courts.

Accordingly, if the Commission determines that additional disclosure rules are warranted – which it should not – it must model any new rules on existing requirements that, at a minimum, take these important interests into account. The federal Courts of Appeals have existing corporate disclosure rules that would provide far more information than the Commission needs in order to address its stated interest. And, in formulating any new rules, the FCC must be mindful of the need to avoid a patchwork of varied disclosure rules that would only further discourage organizations from participating in the policymaking process. Importantly, the FCC must recognize and respect – as do the judicial corporate disclosure rules – the unique status of membership organizations such as the Chamber by exempting them from any additional disclosure requirements that trench on associational rights. In all events, there could be no plausible justification for adopting rules that go beyond the judicial corporate disclosure requirements of the D.C. Circuit Rules.

II. THERE IS NO EVIDENCE OF ANY REGULATORY PROBLEM SUFFICIENT TO SUPPORT THE ADOPTION OF ENHANCED DISCLOSURE REQUIREMENTS.

The Commission's rulemaking authority is constrained by the APA, which requires the FCC to justify any rules that it adopts based on record evidence that demonstrates a regulatory problem in need of fixing.[4] As the courts have explained, "a regulation perfectly reasonable and

[4] *See, e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

appropriate in the face of a given problem may be highly capricious if that problem does not exist."[5]

The initial record in this proceeding contained nothing more than vague allegations and hypothetical concerns regarding the failure of parties "adequately" to disclose their identities or the interests that they represent when advocating before the FCC. This is so despite the agency's explicit request for comment on the need for enhanced disclosure rules in the NPRM.[6] There is certainly no evidence that the Commission or interested parties are with any frequency unaware of the actual identities of entities participating in FCC proceedings. To the contrary, the only concerns that *any* commenters expressed involved ad-hoc or so-called "astroturf" committees.[7] Although the Chamber does not agree that there is evidence of a real regulatory problem as to any entities appearing before the Commission, it bears emphasis that, even as to these types of ad hoc groups, participants in the FCC's October 2009 *Ex Parte* Workshop (three of the eleven present) called the lack of full disclosure at most an "occasional problem,"[8] with one observer declaring that, as to further rules requiring disclosure of real parties in interest, he was "not sure that this is necessary."[9] Such tepid, isolated record statements fall far short of the record

[5] *HBO, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (internal quotation marks and citation omitted).

[6] NPRM, ¶¶ 27-31.

[7] Free Press NPRM Reply Comments at 3 (filed June 8, 2010) ("Free Press NPRM Reply Comments); *see* Verizon and Verizon Wireless NPRM Comments at 4 (filed May 10, 2010) ("Verizon and Verizon Wireless NPRM Comments").

[8] Remarks of Andrew Jay Schwartzman, Media Access Project, at the FCC Workshop, Improving Disclosure of *Ex Parte* Contacts (Oct. 28, 2009) (transcript available in CG Dkt. No. 10-43, Ex Parte Workshop Transcript) ("FCC *Ex Parte* Workshop"); *see also* Remarks of Jef Pearlman, Public Knowledge, at the FCC *Ex Parte* Workshop (stating that non-disclosure is not "a huge problem").

[9] Remarks of John Muleta, M2Z Networks, at the FCC *Ex Parte* Workshop.

evidence necessary to justify adoption of enhanced disclosure requirements for all FCC filers under the APA.

Moreover, neither the Commission nor any party advocating for enhanced disclosure requirements has clearly articulated *why* (other than to satisfy apparent curiosity or, worse, to exact reprisals upon members of an organization) additional information regarding the identity of parties petitioning the government is needed. In most instances parties have every incentive to make their identities clear, because doing so can reasonably be expected to enhance their credibility and the persuasiveness of their arguments. In addition, the FCC remains free not only to give less weight to arguments presented by a party whose interest in a proceeding is unclear but also to ask for more information on a case-by-case basis. Given this absence of a substantial policy justification for enhanced disclosure requirements, adoption of such rules would be arbitrary and capricious and violate the APA for this reason as well.

In addition, the proposed disclosure requirements implicate important First Amendment rights, requiring the FCC also to be mindful of *constitutional* constraints on its authority. For example, enhanced disclosure rules could require organizations seeking to participate in Commission proceedings – a form of First Amendment-protected political speech as well as an exercise of the constitutional right to petition the government under the Amendment's Petition Clause – to reveal a substantial portion of their lobbying donor lists, the identity of those who provide financial support for lobbying efforts before the FCC, internal details about the structure of their organization, and possibly even their general membership. Indeed, Free Press, in comments submitted in response to the initial NPRM, argued that the Commission should require "mandatory disclosure of *all* financial contributions directed to funding Commission advocacy

activity," including, but not limited to, oral *ex parte* presentations,[10] and that certain "independent organizations," in particular, should be required to disclose all donors contributing more than a certain, fixed, amount.[11] As the Supreme Court has held, however, the "freedom to engage in association for the advancement of beliefs and ideas" is critical to the freedoms of liberty and speech and is subject to protection under the First Amendment.[12] More generally, the Supreme Court has made clear that regulations affecting speech cannot be justified based on mere conjecture.[13] Yet, as discussed above, the Commission and those pressing enhanced disclosure proposals offer nothing more than conjecture in support of their position. A record that is too thin to pass muster under the APA, as explained above, would necessarily fail to satisfy the First Amendment.

Finally, the absence of record evidence supporting the existence of a problem raises the specter that requiring enhanced disclosure of parties participating in FCC proceedings is not designed to serve any legitimate interest. But for the improper motivation of "subject[ing] [participation in agency proceedings] to threats, harassment, or reprisals from either Government

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[10] Free Press NPRM Reply Comments at 2 (emphasis added); *see also* Nat'l Ass'n of State Util. Consumer Advocates NPRM Comments at 5 (filed May 10, 2010) ("NASUCA NPRM Comments") (urging the Commission to apply enhanced disclosure requirements "to all filings with the FCC").

[11] Free Press NPRM Reply Comments at 5.

[12] *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

[13] *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (under intermediate scrutiny, the government bears a heavy burden of proof and must "demonstrate that the recited harms are real, not merely conjectural"); *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993) (even with respect to lesser-protected commercial speech, the government's burden in justifying such a speech restriction "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real").

officials or private parties,"[14] it is unclear what proper end enhanced disclosure mandates would achieve given that the record does not demonstrate any real "need" to know more about the internal organization and funding of parties. The risk of harassment is especially troubling for certain organizations whose members in the past have been targeted by those who disagree with their policy positions, including government officials. A desire to harass an organization's members in an attempt to silence or curtail the group's advocacy based on disagreement with its message cannot lawfully serve as the basis for imposing an impediment to advocacy before the Commission.

III. ANY ENHANCED DISCLOSURE REQUIREMENT THAT THE COMMISSION ADOPTS MUST BE APPROPRIATELY TAILORED AND RECOGNIZE THE UNIQUE STATUS OF MEMBERSHIP ORGANIZATIONS.

Even if there were adequate record evidence to support *some* form of enhanced disclosure requirements – which there is not – any such mandates would have to be appropriately tailored to the Commission's supposed goals. Agency rules will be struck down as arbitrary and capricious if there is not a proper fit between the means chosen and the ends sought to be achieved, where the agency "fail[s] to consider . . . important aspect[s] of the problem," or where it fails to consider available alternatives.[15] Similarly, under the First Amendment, disclosure requirements must have a "substantial relation" to the governmental interest to be served.[16] Application of these guiding principles makes clear that, if the Commission insists upon adopting further

[14] *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) (citation omitted).

[15] *See, e.g., Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 50-51 (1983); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (rules must "actually produce the benefits the Commission originally predicted they would").

[16] *Citizens United*, 130 S. Ct. at 914; *see also Turner*, 512 U.S. at 664 (intermediate scrutiny requires the government to show "that the regulation will in fact alleviate the[] harms in a direct and material way"); *Edenfield*, 507 U.S. at 770-771 (even with respect to lesser-protected commercial speech, the government "must demonstrate that . . . its restriction will in fact alleviate the[] [cited harms] to a material degree").

regulation in this area, there is no basis for adopting rules that are any more burdensome than the federal corporate disclosure rules; in addition, any further regulation should be limited to the oral *ex parte* context in order to avoid undue interference with the ability of individuals and organizations to petition the agency.

A. The Commission Could Not Justify Inflicting Burdens Greater Than Those Imposed by Federal Corporate Disclosure Rules.

Should the Commission proceed to adopt any enhanced disclosure requirements despite the absence of sufficient record evidence to justify such rules, it would be clearly irrational to adopt rules that impose any greater burden on First Amendment interests than do the corporate disclosure requirements of the federal appellate courts, particularly the D.C. Circuit. These rules already require the disclosure of more than enough information for the FCC to achieve its stated interests and are significantly less burdensome than the alternative models proposed in the NPRM. Judicial corporate disclosure rules also at least recognize the special associational concerns of membership organizations and trade groups, whose interests in FCC proceedings are in fact already readily apparent.

1. Judicial Corporate Disclosure Rules Provide More Than Sufficient Information to Serve the FCC's Stated Goal.

The FCC asserts in the FNPRM that its goal is to address situations in which "a party filing a pleading with the Commission or making an *ex parte* contact may be representing the interests of another undisclosed party, or the presenter's interest in the proceeding may not be entirely clear."[17] Court corporate disclosure rules would be more than sufficient to inform both the agency and interested parties about whose interests any participating party represents – and what each party's interests are – in a given proceeding.

[17] FNPRM, ¶ 37.

The federal appellate courts have in place rules addressing corporate ownership disclosures. Specifically, Federal Rule of Appellate Procedure 26.1 requires that nongovernmental entities appearing before the court disclose "any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation."[18] The courts adopted this rule "so that a . . . judge could ascertain whether recusal was necessary under the law."[19]

The difference in purpose of the judicial corporate disclosure rule, which is meant to facilitate a judge's consideration of the need to recuse him or herself, highlights the lack of need for the FCC's enhanced disclosure rules in the first place. The FNPRM has not suggested that the Commissioners currently lack adequate information upon which to make proper recusal decisions. Certainly there is no basis for requiring *greater* disclosure in connection with FCC proceedings for the purpose of ensuring that information regarding real parties in interest is disclosed than there is in ensuring that a judge has no bias in favor of or against a party to litigation.[20] Even if the FCC could establish an actual need for disclosure requirements (which it

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[18] Fed. R. App. P. 26.1; *see* D.C. Cir. R. 26.1.

[19] *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure* 7-8 (Mar. 2000), *available at* http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Reports/ST3-2000.pdf.

[20] At the same time, it would be illogical to apply enhanced disclosure rules selectively to certain participants in FCC proceedings. In particular, requiring only corporations and trade associations to submit disclosure statements, as suggested by the NASUCA, would distort the advocacy process and unfairly single out these participants for differential, more burdensome treatment. *See* NASUCA NPRM Comments at 5-6. To be sure, there may be some truth to the argument that individuals "will likely disclose the basis [for their] information, rather than risk having [it] disregarded," but this principle applies equally to corporations and trade associations. A bifurcated requirement would unfairly favor participation by individuals in FCC proceedings. Similarly, permitting a party to rely on publicly filed FCC ownership disclosure forms, as suggested by Sprint Nextel, *see* Sprint NPRM Comments at 8 (filed May 10, 2010), would discourage participation by those parties, including the Chamber, that do not already file such reports. This type of rule would further insulate Commission proceedings from participation by

cannot), it would defy logic to suggest that *more information* is needed to promote transparency in the regulatory process than is necessary to avoid judicial unfairness.

2. Agency-Specific Disclosure Rules Would Be Unduly Burdensome for Parties Who Advocate Before a Wide Variety of Governmental Entities.

For parties such as the Chamber that advocate before not only the Commission but also many other governmental entities, consistency in disclosure rules is essential to maintaining their ability to effectively advocate across all forms of government. Adoption of rules that depart from the judicial corporate disclosure model would likely result in a patchwork of disclosure rules that would differ from agency to agency. This would be particularly burdensome for organizations such as the Chamber, which would have to regularly ensure compliance with the individual disclosure rules of each of the many government agencies before which it advocates on behalf of its members. It would also create disincentives for organizations with wide-ranging interests to appear before multiple agencies, hampering the effective representation of their members' interests and chilling political speech. For these reasons, it is the judicial disclosure model that would come closest to achieving the Commission's goal of not "imposing undue burdens on the disclosing party"[21] and not inadvertently diminishing the free flow of information to the agency from parties which do not appear exclusively before the Commission and have a wide variety of member experience to draw on in presenting policy suggestions and concerns.

3. Court Corporate Disclosure Rules Afford More Respect to Legitimate Associational Concerns than Any of the FCC's Other Proposed Models.

Unlike the other disclosure models proposed in the NPRM, the judicial corporate disclosure rules have the benefit of at least recognizing the legitimate associational rights of

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those who are not included in the select group of parties heavily regulated by, and who frequently appear before, the FCC.

[21] FNPRM, ¶ 80.

membership organizations such as the Chamber under the First Amendment and, in particular, acknowledging the sensitivity of forced disclosure of otherwise private information about an organization and its members. In particular, the federal appellate corporate disclosure rule does not cover unincorporated entities – including unincorporated membership organizations – *at all*.[22] Even in the D.C. Circuit, where unincorporated entities must make certain disclosures, unincorporated trade associations are exempt from any requirement that they reveal the identity of their members or details about their internal structure.[23] The Chamber is an *incorporated* membership organization and thus falls outside of this exemption. Nevertheless, the Chamber emphasizes that this type of exemption appropriately recognizes both the associational rights of other types of membership organizations and the substantial burden that would accompany any requirement that a membership organization constantly update disclosures to reflect changes in its rolls. Any rule that the FCC decides to adopt must do the same.[24]

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[22] Fed. R. App. P. 26.1.

[23] D.C. Cir. R. 26.1. The rule defines a "trade association" as "a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership." *Id.*

[24] The FNPRM also suggests that the Commission might look to Supreme Court Rule 37.6, which requires certain disclosures to be made regarding the funding of amicus briefs, but this proposal should be rejected. *See* FNPRM, ¶ 82; *see also* Fed. R. App. P. 29(c)(5). The judicial funding disclosure rule is designed primarily to "deter counsel from using an amicus brief to circumvent page limits on the parties' briefs." Federal Civil Judicial Procedure & Rules 578 (West 2011) (citing *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003)). This interest is plainly irrelevant to Commission rulemakings, which are the primary focus of the proposals here, because no page limits apply to *ex parte* notices or other filings (including comments) in such proceedings. Such rules may also "help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief." *Id.* But, given the absence of evidence sufficient to support the imposition of any disclosure rules at all, *see supra* Section II, and particularly in light of the sensitive associational rights at stake, the FCC certainly could not justify requiring disclosure of specific information regarding *funding* in furtherance of an ephemeral interest in allowing an accurate evaluation of the extent of a party's interest in a Commission proceeding. Simply put, without evidence of an actual "problem" regarding disclosure of monetary contributions in furtherance of FCC *ex parte* presentations (which evidence is even more clearly lacking in relation to all filings in Commission

B. Any Enhanced Disclosure Requirements That the Commission Adopts Should Be Limited to the Ex Parte Context.

It is also important that the Commission limit the application of any enhanced disclosure rules to the *ex parte* phase of FCC proceedings. This rulemaking grew out of concerns related primarily to that particular portion of FCC proceedings, which involves oral communications by interested parties with decisionmakers, *after* the notice and comment period has closed, that other interested parties would not be privy to save for the requirement that the presenting parties publicly disclose the occurrence and substance of the communications.[25] By contrast, written comments filed in the rulemaking process are publicly available, and thus do not present the same policy issues regarding fair process that *ex parte* oral communications uniquely do. Indeed, in the rulemaking stage of agency proceedings, commenters have every incentive to identify themselves in order to make clear what their interests are and how they relate to the matters under consideration. Thus, limiting any rules to the *ex parte* context is clearly required under the APA and First Amendment principles discussed above, as there has been no showing of need whatsoever for such regulation in rulemaking proceedings generally or any demonstration of any legitimate benefit of such regulation that could possibly justify the speech burdens imposed on commenters. *See supra* Section II. Adoption of broader requirements without a clear demonstration of need would be patently inconsistent with the requirement that

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proceedings), the FCC's adoption of a funding disclosure requirement would violate the APA and the First Amendment.

[25] *See, e.g.*, NPRM, ¶ 1 ("[W]e begin a new proceeding to improve the transparency and effectiveness of the Commission's decisionmaking by reforming our ex parte rules . . . [and] seek comment on proposals to improve our ex parte and other procedural rules to make the Commission's decisionmaking processes more open, transparent, and effective."); *id.* ¶ 5 (noting genesis of proceeding in "a staff workshop on the *ex parte* process").

the FCC adequately consider less burdensome alternatives in fashioning rules, particularly those that implicate First Amendment rights.[26]

Requiring enhanced disclosure outside of the *ex parte* context could also have the counter-productive effect of limiting political advocacy before the FCC. As the Commission has recognized, "greater disclosure might discourage some entities from participating in our proceedings."[27] This disserves the agency's interest in ensuring that it receives input from a wide range of parties with divergent views, not just those who regularly appear before the FCC, making it more difficult for the Commission to adopt rational rules that take into account all relevant interests. Participation in FCC proceedings is also a form of First Amendment-protected political speech and an exercise of the constitutional right to petition the government under that Amendment's Petition Clause.[28] Rules that place a condition upon *all forms* of advocacy before the Commission – in essence creating a toll booth at the gates of the agency's free speech and advocacy highway – would jeopardize the FCC's interest in ensuring that it compiles a full record on which to base its decisions and would risk interference with these important constitutional rights.

C. Broader Disclosure Requirements Would Raise Even More Significant Concerns Under the APA and the First Amendment.

The proposal by the Commission, supported by Free Press,[29] to adopt rules based on the Lobbying Disclosure Act ("LDA") would be particularly inappropriate for agency proceedings,

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[26] *See supra* notes 15-16.

[27] NPRM, ¶ 29.

[28] *See MCI Commc'ns Corp. v. AT&T*, 708 F.2d 1081, 1153 (7th Cir. 1983). The APA also protects the right to petition an agency. *See* 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").

[29] *See* FNPRM, ¶ 82; Free Press NPRM Reply Comments at 5-8.

subjecting participants to unnecessary constraints that would ultimately decrease the flow of information to the Commission and limit political speech. The LDA serves a unique role in the legislative context, where Congress generally does not labor under any statutory procedural regime meant to ensure the integrity of its actions. Under the APA, by contrast, agencies are required to engage in reasoned decisionmaking and must issue written decisions that provide adequate support for their rulemaking and adjudicatory judgments on the basis of a record.[30] The fact that the agency must provide such affirmative justification provides the necessary incentives for parties to disclose their identities and for the Commission to recognize each party's interests when issuing orders.

LDA-styled requirements would also be unduly burdensome in the context of FCC advocacy. Such rules would require large membership organizations such as the Chamber of Commerce to determine the pro-rata amount of funding that each of its members contribute toward FCC advocacy and, even more onerous, whether particular members "actively participate" in the planning or control of the organization's advocacy before the Commission. Because this participation would likely change on an issue-by-issue basis (and, due to the multi-faceted nature of many FCC proceedings, would be likely even to change *within a single proceeding*), organizations could be required to constantly monitor and update their disclosure statements. This, in turn, would severely discourage participation in FCC proceedings.

Further, rules based on the LDA would raise yet more First Amendment concerns as applied to FCC proceedings. Whereas lobbying is a narrowly defined activity that does not

[30] *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984) ("[T]he key to the arbitrary and capricious standard is its requirement of reasoned decisionmaking: we will uphold the Commission's decision if, but only if, we can discern a reasoned path from the facts and considerations before the Commission to the decision it reached.").

encompass all participation in the legislative process,[31] the enhanced disclosure rules would potentially apply to a wide variety of (or, potentially, all) speech designed to influence the outcome of an FCC proceeding. Enhanced disclosure rules thus run the risk of "prevent[ing] anyone from speaking" in ways that the courts have found the LDA does not.[32]

Finally, adopting LDA-styled rules would contradict Congress' decision to exempt activities pursuant to notice-and-comment rulemaking from the LDA's disclosure requirements. The LDA defines both "lobbying activities" and "lobbying contacts"[33] but specifically excludes from those definitions: communications such as those directed to a designated agency official designated in response to a Federal Register notice;[34] written, on the record comments in a public proceeding;[35] and written petitions for agency action that are "required to be a matter of public record pursuant to established agency procedures."[36] Congress did so because these filings are already subject to procedural protections sufficient to "ensure that there is a public record of all comments."[37] If Congress had intended the LDA to encompass all advocacy before federal regulatory agencies, it would have included the sort of advocacy that the FCC is attempting to reach with its enhanced disclosure proposals in its definition of "lobbying," but it did not. Instead, Congress chose to exempt such activities from lobbying disclosure rules. The

[31] *See* 2 U.S.C. § 1602(10).

[32] *Cf. McConnell v. FEC*, 540 U.S. 93, 201 (2003) (citation omitted).

[33] 2 U.S.C. § 1602(7)-(8).

[34] *Id*. § 1602(8)(B)(x).

[35] *Id.* § 1602(8)(B)(xiv).

[36] *Id.* § 1602(8)(B)(xv).

[37] H.R. Rep. No. 104-339(I), at 16 (1995).

Commission would thus contravene both the text of the LDA and the clear intent of Congress if it decided unilaterally to subject advocacy before the agency to LDA-style rules.

D. Any Rules Adopted Must Also Satisfy the Paperwork Reduction Act.

The Commission also must bear in mind that any of the proposed enhanced disclosure rules would be subject to review under the Paperwork Reduction Act ("PRA") as a "collection of information."[38] The PRA requires the Commission to seek comment on the burdens of compliance in relation to their benefits and to obtain approval from the Office of Management and Budget before the rules can become effective.[39] Given the lack of evidence that disclosures under current rules are insufficient, the potentially burdensome nature of the proposed rules could cause them to run afoul of the PRA.[40]

In addition, due to the thin record in support of enhanced disclosure requirements in general and the reality that incentives may differ at different stages of a proceeding, such requirements would face greater hurdles under a PRA analysis if they were applied generally to all FCC filings. Limiting them to the *ex parte* context as suggested above,[41] by contrast, would reduce regulatory burdens, thus rendering the rules more consistent with the PRA.

IV. CONCLUSION

The proposals to adopt enhanced disclosure rules are a drastic, constitutionally-sensitive solution for a problem that is either non-existent or barely existent. In the process of addressing a non-problem, then, the Commission risks discouraging membership organizations such as the

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[38] 44 U.S.C. § 3502(3).

[39] *Id.* § 3506(c)(2).

[40] *See* 5 C.F.R. § 1320.5(e) (explaining that OMB "will consider whether the burden of the collection of information is justified by its practical utility").

[41] *See supra* part III.B.

Chamber from participating in its proceedings and adding their voice to the development of communications policy by weighing them down with detailed disclosure requirements about the structure of their organizations, their donors, and even their general membership. Not only is such a result contrary to the public interest, but it would also violate the APA and raise substantial First Amendment concerns.

Should the Commission nevertheless choose to act, it must at the very least tailor its rules appropriately. The judicial corporate disclosure rules of the federal appellate courts, in particular the D.C. Circuit, are the least burdensome of all the potential models offered by the FCC. Such rules would provide more than enough information for the Commission to address the primary issue that it has alleged – participation by unidentified ad-hoc parties – and would recognize the constitutional right of associations and other membership organizations to advocate freely and effectively on behalf of their members.

Respectfully submitted,

U.S. Chamber of Commerce

By: /s/

Helgi C. Walker
Eve Klindera Reed
Ari Meltzer
Wiley Rein LLP
1776 K. St. NW
Washington, DC 20006
(202) 719-7000
Counsel to the U.S. Chamber of Commerce

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